

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	
v.	:	(Crim. No. 94-356-01)
	:	
ROBERT MCQUILKEN	:	NO. 97-6425

FINDINGS OF FACT AND CONCLUSIONS OF LAW

J. M. KELLY, J.

AUGUST , 2000

Presently before the Court is a Motion to Vacate, Set Aside or Correct Sentence filed by the Petitioner, Robert McQuilken (“McQuilken”) pursuant to 28 U.S.C. § 2255 (1994). This matter is on remand from the United States Court of Appeals for the Third Circuit. On February 22, 2000, this Court held an evidentiary hearing regarding whether McQuilken was deprived of effective assistance of counsel. Based thereon, the Court makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

A. Background Facts

1. McQuilken was convicted by a jury of conspiracy to distribute methamphetamine, distribution of methamphetamine, distribution of methamphetamine within 1000 feet of a school and use of a communications facility in furtherance of a drug trafficking crime.

2. Thereafter, McQuilken was determined to be a career offender and was sentenced to 360 months imprisonment, 12 years supervised release, a fine of \$2,000.00 and a \$200.00 special assessment.

3. The conviction was affirmed by the Third Circuit Court of Appeals and the United States Supreme Court denied McQuilken’s petition for a writ of certiorari.

4. McQuilken then filed a motion pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct his sentence in which he asserted, among other things, ineffective assistance of counsel based on counsel's alleged failure to communicate regarding the Government's plea offer.

5. This Court adopted the Report and Recommendation of Magistrate Judge Thomas J. Rueter that McQuilken's motion be denied.

6. McQuilken filed a motion for a certificate of appealability which was granted by the Third Circuit on the issue that counsel "may have ineffectively failed to inform him of a plea offer." The matter was remanded to this Court for an evidentiary hearing which was held on February 22, 2000.

7. Prior to and during trial, McQuilken was represented by Vincent Ziccardi, Esq. ("Ziccardi").

8. After trial but before sentencing, Ziccardi withdrew as McQuilken's counsel and Robert Donatoni, Esq. ("Donatoni") was appointed to represent the Petitioner.

9. Ziccardi has since passed away.

B. Ziccardi Informed McQuilken of the Government's Plea Offer

10. Prior to trial in this case, the Government informed Ziccardi that it would be willing to enter into a plea agreement under which McQuilken would plead guilty to the charges against him and cooperate with the Government. If, in the Government's discretion, McQuilken provided substantial assistance in the investigation or prosecution of another individual or individuals, the Government would move, pursuant to 18 U.S.C. § 3553(e) and/or § 5K1.1 of the United States Sentencing Guidelines ("Sentencing Guidelines") for a downward departure from the sentencing guidelines range.

11. On January 17, 1995, prior to jury selection, the Government raised the issue of whether McQuilken had been fully advised of its plea offer. In doing so, the Government reviewed generally the penalties facing the Petitioner as well as the terms of the plea offer. The Government stated in open court that if McQuilken cooperated with the Government and provided substantial assistance in the investigation or prosecution of another person, the Government would file a motion allowing the Court to depart from the applicable mandatory minimum sentence and sentencing guidelines range.

12. Ziccardi responded by informing the Court that he had indeed spoken with McQuilken regarding the Government's plea offer prior to trial and that their discussion had contributed to a disagreement between them on this and other matters that caused them to not speak for approximately two months. McQuilken confirmed that he and Ziccardi had not spoken for two months prior to trial.

13. McQuilken was present and heard Ziccardi's statement to the Court and did not contradict it or object to his attorney's comments.

14. McQuilken was capable of and had previously raised issues directly with the Court during the January 17, 1995 hearing. With only a request for recognition by Ziccardi, McQuilken addressed the Court regarding discovery matters and expressed his dissatisfaction that Ziccardi had not provided him with all of the discovery in the case.

15. McQuilken's silence during Ziccardi's statement that he had previously discussed the Government's plea offer with the Petitioner evidences McQuilken's assent to his attorney's statements.

16. At the February 22, 2000 hearing on this matter, McQuilken testified that at no

time prior to January 17, 1995 did Ziccardi discuss with him the possibility of cooperating with the Government or the terms of the Government's plea offer.

17. McQuilken's testimony in this regard is not supported by his prior conduct and was not credible.

18. Ziccardi informed McQuilken of the Government's plea offer and discussed it with him prior to the January 17, 1995 hearing.

C. McQuilken Did Not Want to Plead Guilty and Cooperate with the Government

19. McQuilken was present on January 17, 1995 and heard the Government's statement of the terms of the plea offer.

20. McQuilken took no action at or after the January 17, 1995 hearing to indicate to anyone that he wanted to cooperate with the Government to earn a motion for a downward departure.

21. Prior to trial, McQuilken wrote Ziccardi an undated letter in which he stated, "I think I have a shot at fighting them (Feds)" and asked Ziccardi to "fight all you can fight to more or less save my life"

22. The letter further stated, "My brother knows what he has to do. I've already explained that they [the Government] will use scare tactics & have him think I'm turning on him, he is aware of this!"

23. McQuilken was aware that he had the option of providing information against his co-defendant and that cooperating with the Government was one way a prisoner could reduce his sentence.

24. McQuilken was also aware of the Sentencing Guidelines, including § 5K, and that

they would determine ultimately the range of months within which the Court would set his sentence and his eligibility for a downward departure from that range.

25. McQuilken brought to Ziccardi's attention his possible eligibility for a § 5K2 downward departure for medical disability as well as a case he felt would further lower his potential sentence.

26. McQuilken did not tell Ziccardi that he wanted to cooperate with the Government to try to earn a lesser sentence.

27. Following trial but before sentencing, in a letter bearing a "received" stamp dated May 18, 1995, McQuilken wrote to Donatoni providing him with history on the case. In the letter he stated:

I'm sure with your speaking to Mr. Ziccardi he would tell you that I am NOT afraid to fight and go to trial so please sir don't come to me with a number from the Govt. to plead out to or think I am one of the scores of mice that want to be a part of the Govt's hand out's [sic] that are nothing more than a joke

28. At the February 22, 2000 hearing on this matter, McQuilken testified that he would have been willing to plead guilty to the charges against him and cooperate with the Government.

29. McQuilken's testimony in this regard is undermined by his prior conduct and was not credible.

30. McQuilken did not want to plead guilty and cooperate with the Government.

31. McQuilken told Ziccardi that he did not want to plead guilty and cooperate with the Government; he wanted to go to trial.

32. Ziccardi's representation of McQuilken was not ineffective assistance of counsel.

II. CONCLUSIONS OF LAW

1. By alleging in his motion to vacate, set aside or correct sentence that he had received ineffective assistance of counsel from Ziccardi, McQuilken waived the attorney-client privilege with regard to the subject matter of the alleged ineffectiveness, namely the decision to go to trial rather than accept the Government's plea agreement. See Tasby v. United States, 504 F.2d 332, 336 (8th Cir. 1974).

2. By alleging that Donatoni failed to raise an issue relating to McQuilken's knowledge of the Government's plea offer, the Petitioner has waived the attorney-client privilege with regard to communications with Donatoni on that matter.

3. The Sixth Amendment to the United States Constitution guarantees that in all criminal prosecutions, the accused has a right to reasonably effective assistance of counsel for his or her defense. See U.S. Const. amend VI; Strickland v. Washington, 466 U.S. 668, 687 (1984); United States v. Day, 969 F.2d 39, 42 (3d Cir. 1992).

4. In Strickland, the United States Supreme Court set forth a two-part test for ineffective assistance of counsel claims. See Strickland, 466 U.S. at 687. In order to prevail, the Petitioner must show first that his counsel "made errors so serious that [he] was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," and second that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id.

5. A defendant has a right to make a reasonably informed decision whether to accept a plea offer. See United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 438 (3d Cir. 1982); United States v. Gordon, 979 F. Supp. 337, 340-41 (E.D. Pa. 1997). Failure of an attorney to

inform his or her client of a proposed plea offer or the comparative sentence exposure between pleading guilty and standing trial deprives the defendant of the right to make an informed decision and may constitute ineffective assistance of counsel. See Zelinsky, 689 F.2d at 438; McCoy v. United States, 96 F. Supp. 2d 469, 478 (E.D. Pa. 2000); Gordon, 979 F. Supp. at 340-41.

6. The Court finds that Ziccardi informed McQuilken of the Government's plea offer and discussed with him the possibility of cooperating with the Government in an attempt to earn a motion for a downward departure. Accordingly, McQuilken has not demonstrated that Ziccardi's representation was sufficiently lacking to state an ineffective assistance of counsel claim.

7. The Court also finds that McQuilken wanted to proceed to trial rather than plead guilty. Therefore, he has not shown that he was prejudiced, or that absent Ziccardi's alleged error, the result would have been different.

8. McQuilken has not established either prong of the Strickland test and his motion to set aside, vacate or correct sentence is denied.

9. McQuilken has not made a substantial showing of the denial of a constitutional right. Accordingly, there is no basis for issuance of a certificate of appealability.

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ORDER

AND NOW, this day of August, 2000, in consideration of the Motion to Vacate, Set Aside or Correct Sentence filed by the Petitioner, Robert McQuilken and an evidentiary hearing held on this matter, it is ORDERED that the motion is DENIED. The Petitioner has not made a substantial showing of the denial of a constitutional right. Accordingly, there is no basis for issuance of a certificate of appealability.

BY THE COURT:

JAMES McGIRR KELLY, J.